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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

[redacted]

JAN 24 2003

File: WAC 02 040 56640 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for#Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an auto collision repair and restoration firm. It seeks to employ the beneficiary permanently in the United States as an auto body shop manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements…. In appropriate cases, additional evidence, such as profit/loss statements … may be submitted….

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is April 24, 2001. The beneficiary's salary as stated on the labor certification is $24.92 per hour or $51,417.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On February 26, 2002, the director requested complete

federal tax returns, especially for 1999, and quarterly wage reports for 2001 to establish the ability to pay the proffered wage.

Counsel provided, as requested, the complete 1999 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner, herein the owner. Schedule C reflected the petitioner's net loss of ($106,482).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel calls attention to gross sales of $216,988, apparently, in 2000. Further for 2000, counsel offers, as Exhibit B, the petitioner's Form 1040 U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business. The latter omits, however, the Statement referenced in Part V of Schedule C. In any event, Exhibit B showed a profit in 2000 of $579, less than the proffered wage.

Pertinent to 2001, counsel submits Exhibit C, an extract titled "[The owner's] Income Statement for the Period Ended October 31, 2001," (Exhibit C). Exhibit C claims total revenue of $408,396.01 and operating income of $94,129.63. Alone among the submissions, Exhibit C possesses the virtue of relating to the priority date of the petition, April 24, 2001.

Counsel contends that the petitioner may rely on secondary evidence, such as the profit and loss statements in Exhibit B and C, to prove the ability to pay. The text of 8 CFR 204.5(g)(2), *supra*, explicitly mandates that proof shall be in the form of annual reports, federal tax returns, or audited financial documents. Exhibit B omits parts of Schedule C and other elements of the 2000 tax return, and it does not relate to the priority date of the petition. Exhibit C is an unaudited profit and loss statement of 2001.

Counsel filed the appeal on June 2, 2002. The record does not demonstrate the unavailability of the primary evidence to satisfy the required proof of the ability to pay the proffered wage, namely, the complete 2000 federal tax return showing a profit and the 2001 annual report, audited financial documents, and federal tax return. The absence or unavailability of required evidence creates a presumption of ineligibility.

8 CFR 103.2(b) states in pertinent part,

(2) Submitting secondary evidence and affidavits - (i)

> *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document … does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ….

Counsel's other contentions are moot in view of the ineligibility stemming from the absence of prescribed evidence of the ability to pay the proffered wage on the priority date, April 24, 2001, and continuing to the present. Nonetheless, counsel's arguments beyond the prescribed evidence merit attention.

One contention assumes that any net income proves the ability to pay. In fact, it must equal or exceed the proffered wage at the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. 8 CFR 204.5(g)(2).

Counsel claims that the petitioner's four (4) years of successful business operations warrant the approval of the petition. In fact, 1999 involved a loss of ($106,482) and 2000 a profit of $579, less than the proffered wage. There is no history of many profitable years interrupted by exceptional circumstances in a particular one. *See* Matter of Sonegawa, 12 I. 612 (Reg. Comm. 1967). Matter of Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years.

Counsel speculates that the beneficiary may well generate a larger profit through supervision and coordination to ensure efficiency. The petitioner has not provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

Accordingly, after a review of the federal tax returns, all of the submissions, and the brief, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.